



# FEDERALLY SPEAKING



by Barry J. Lipson

Number 38

Welcome to **FEDERALLY SPEAKING**, an editorial column compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to help keep you abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a “heads ups” to Federal CLE opportunities, or other Federal legal occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 38th column. This and prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania <http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm>.

## **LIBERTY'S CORNER**

**DRAKE DUCKS AND DODGES JTTF GAG AND SUPBEONA.** *First, the Cast of Characters:* The **Joint Terrorism Task Force (JTTF)**, formed in response to 9/11, is comprised of Federal, State and Local governmental agencies, and describes itself as being “responsible for all domestic and international terrorism matters,” and its mission as being “to prevent acts of terrorism, and investigate acts of terrorism in an effort to identify and prosecute those responsible.” The **National Lawyers Guild (NLG)**, founded in 1937, sees itself as a union of “lawyers, law students, legal workers and jailhouse lawyers of America” with the mission of seeing “that human rights shall be regarded as more sacred than property interests ... and who look upon the law as an instrument for the protection of the people, rather than for their repression.” **Drake University**, a recipient of Federal funds, is a private institution of higher learning with 5,100 students and an **NLG Chapter**. The **U.S. Attorney** and **Local Sheriff** are governmental law enforcers who come within the ambit of the **JTTF**. **Camp Dodge**, the old McHarg homestead, is the home of the **Iowa National Guard**. *Then, the Plot:* **Drake University** and four individuals were *subpoenaed* to divulge documents relating to an antiwar forum held by the **NLG** at **Drake** on November 15, 2003, including, from **Drake**, all forum records, the names of forum attendees, the records of the **NLG Drake Chapter**, the names of **NLG Chapter** members, **Drake's** security records and any observations about the forum. **Drake's** bill was also duct taped shut by a “gag” or “nondisclosure order,” forbidding any quacking about the subpoena or its contents (but which did not prevent a “little duckie” from “telling” the foregoing). This was apparently sought in conjunction with a **Federal Grand Jury** probe of an incident or two of “unlawful entry” the next day at **Camp Dodge**. The “headline” incident involved **Local Sheriff's Deputies** and other law officers “starkly” waiting for protesters to cross a “line” in the vicinity of **Camp Dodge's STARC Armory (State Area Readiness Command Armory)**, and then arresting them for being on **National Guard** property. The second apparently unrelated incident elsewhere in **Dodge City** (oops! **Camp Dodge**) involved an individual allegedly attempting to enter or entering a fenced area (a Cattleman scouting the old McHarg Hog Farm?). According to **U.S. Attorney Stephen O'Meara**: “The narrow purpose and scope of that [NLG] inquiry is to determine whether there were any violations of **federal law**, or prior agreements to violate **federal law**, regarding **unlawful entry** into military property -- and specifically to include whether there were any violations as a result of an attempt to enter within the fenced, secure perimeter at **Camp Dodge**.” *The Grande Finale!* The **NGL** believed, however, that the **Government** was **unconstitutionally** shooting a machine gun from a duck blind at the **NLG** flock and lead **Drake**, and suit was filed. The **U.S. District Court for the Southern District of Iowa**, or someone, appears to have agreed, as all five *subpoenas* have now been *quashed* and the *gag order* lifted. Thus, the **Drake** and the **NLG** flock have, for now, pecked off their gags, dodged the bullets, and possibly ducked out of the **JTTF** sights. *Postscript:* But was the **JTTF** actually involved?

Reportedly, a **Local Sheriff's Deputy** known to work on the **Joint Terrorism Task Force** served these subpoenas. **U.S. Attorney O'Meara**, however, states, "reports that this matter are being investigated by the **Joint Terrorism Task Force** are not accurate." The **U.S. Attorney** further assures that the "**United States Attorney's Office** does not prosecute persons peacefully and lawfully engaged in rallies which are conducted under the protection of the **First Amendment** to the **Constitution of the United States**."

## **FED-POURRI™**

**INTERLOCUTORY APPEALS – YES; RACIAL SLURS – NO!** The **U.S. Court of Appeals for the Seventh Circuit** finds some **interlocutory appeals** to be of value, and finds (parenthetically) that the contention that Black employees may like racial slurs "strains credulity" (*Allen v International Truck And Engine Corporation*, No. 04-8001 (7<sup>th</sup> Cir. Feb. 13, 2004)). The **Court of Appeals** acted upon this **interlocutory appeal** now because "*immediate review would promote the development of the law governing questions that have escaped resolution on appeal from final decisions*, see *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999)" (emphasis added); and because "by a swift remand ... [i]t is better to act summarily on this **interlocutory** matter than to delay the proceedings during full-dress appellate review" so as to promptly correct the **District Court's** error in not certifying this **racial discrimination** case as a **class action**. Why such special treatment? Perhaps because of the employer's incredulous "contention that even partial **class certification** is inappropriate because workers may have *liked* being called '*nigger*' and '*jungle bunny*,' *chuckled* when other workers posted cartoons of black men being *lynched* and displayed *nooses* in the workplace, or at least not minded such things," which issues if relevant, the **Seventh Circuit** advised, "could be isolated for individual treatment if evidence demonstrates that insults and threats *rolled off the backs* of some workers" (emphasis added).

**GOOOOOOOOOOGLE, THE TRADEMARK!** Or that's how it appears at the bottom of a **Google** Internet Search Page – not "**Google**," as registered at the **U.S. Patent and Trademark Office (USPTO)**, with two not *ten* zeros. This, perchance, led some dictionaries to conclude that the "site's name is apparently derived from '**googol**'", which was "coined in 1938 by Milton Sirota, the nine-year-old nephew of American mathematician, Edward Kasner" (the "number represented in *base-ten* by a one with a hundred zeroes after it"), which in turn was expanded into the coined word "**googolplex**" ("a cardinal number represented as 1 followed by a googol of zeros [*ten* raised to the power of a googol]," or "a gaggle of googols"), converted then into "**Googleplex**" by Douglas Adams in "*The Hitchhikers Guide to the Galaxy*" (which first aired in 1978 on **BBC Radio**): "'And are you not,' said Fook, leaning anxiously forward, 'a greater analyst than the **Googleplex** Star Thinker in the Seventh Galaxy of Light and Ingenuity which can calculate the trajectory of every single dust particle throughout a five-week Dangrabad Beta sand blizzard?'" Leading, perhaps, to the "**Googlemeister**" shrinking it to "**Google**," the trademark. But, applying **Occam's Razor** ("the simplest of two competing theories is to be preferred"), the **USPTO** search engine may provide the mind-boggling (or "googling") answer -- **Barney Google!** That "**Goofy**" (oops! – wrong strip), gooney **Barney Google**, "*with the goo-goo-googly eyes*," was born in the 1919 comics. The first "**Barney Google**" trademark registration was in 1925 for goeey cream and sherbet concoctions. Then in 1938, the year after **Snuffy Smith** joined the strip (and the year of Sirota's "googol"), **King Features** finally filed '**Barney Google and Snuffy Smith**' with the **USPTO**, which trademark registration is still "alive" today. Now **Google**, uncomically, is accused of trying to "snuff out" other wordsmiths "quiet enjoyment" of their trademarks, while enjoying its own **registered trademark** status. First **eBay** of Internet auction fame complained, and **Google** backed off, then French purse peddler **Louis Vuitton** and French travel agents **Luteciel** and **Viaticum** sued the **Google Group** in France, resulting in fines and '**Ordres à Cesser et Renoncer**.'" Most recently, **American Blind and Wallpaper Factory**, possibly not so blindly, filed suit against **Google**, and its alleged co-conspirators **Netscape** and **AOL**, in the **U.S. District Court for the Southern District of New York**, for similar dastardly deeds. And what has so boggled the minds of all of these entrepreneurs? Google's enterprising idea to help fund its free Internet search service (with its more than 3.3 billion indexed web pages), by selling "**keyword-based advertising**" to searchees' competitors so that, for example, a **Google** search for the trademarked "**Pepsi**" would also display "**Coca Cola**" responses (if **Coca Cola** had purchased this service). While **Google** seems willing to back off from so tying together trademarked terms when "pre-warned," not so with descriptive terms. Even before the **American Blind** blindsiding, **Google** had filed for a **Declaratory**

**Judgment** in the **U.S. District Court for the Northern District of California**, seeking to have “declared” lawful its **keyword advertising program**, especially where descriptive terms (such as “**American blind.**” and “**American wallpaper**”), and not **trademarked** terms (such as “*Decorate Today*” and “*American Blind Factory*”), are being searched. Is **Google** then a grim grisly gobbler of others grandiose goodwill, or are the others the ghastly gawking gogglers of **Google’s** glorious goodies, odiously ogling **Google’s** good business acumen? Which would the googly-eyed one, the beguiling **Barney Google**, gainsay here?

***PATENT SUBMARINES TORPEDOED!*** In the **U.S. Patent and Trademark Office (USPTO)** a “submarine” is not a “submersible warship usually armed with torpedoes” (or even a “large sandwich made of a long crusty roll split lengthwise”), it is a “**continuing patent application**” that lies waiting under the surface at the **USPTO** until such time as the industry becomes dependent on independently developed and/or apparently “public domain” technology claimed in the “submerged” application, at which time it surfaces to claim its **patent monopoly**, holding the industry hostage for the full term of the **patent**; not from the **date of filing**, but from the delayed **date of issue** (traditionally, the **patent monopoly** was for 17-year from the **date of issue**, no matter when the patent application was “launched” by filing it with the **USPTO**). Thus, “**submarine patent applications**” are those that are manipulated to keep them invisibly viable while submerged, mucking about in the **USPTO** deep-sea trenches until such time as an unwitting and unknowing industry has become hooked on the claimed technology. The alleged **Commodore** of this **Submarine Applications Fleet** was Jerome H. Lemelson (“Lemme” to technologists, as in “lemme have it”), who held more than 500 patents at his death at 74 in 1997, including fax machines, portable cassette recorders, cordless telephones, machine vision devices, bar codes, *et al.* He is survived by “*The Lemelson Medical, Education and Research Foundation.*” Interestingly, even his **MIT obit**, where he had been a professor, indelicately reported: “He was sometimes accused of stretching out his **patent applications** for many years to reap the royalty benefits of his invention beyond the 17-year lifespan of a **patent.**” According to Nicholas Varchaver’s May 14, 2001 *Fortune* article “*The Patent King,*” it was contended, “that he never invented the key technologies for which he had the **patents.** Even one of Lemelson's former attorneys, Arthur Lieberman, ... says, Lemelson would figure out where an industry was headed -- and then place a **patent** claim directly in its path. ‘In many cases, Lemelson didn't **patent** inventions,’ says Lieberman. ‘He invented **patents**.... He would look at the magazines and determine the direction of industry.’” On January 23, 2004, Chief Judge Philip M. Pro of the **U. S. District Court for the District of Nevada**, issued a **Declaratory Judgment** in *Symbol/Cognex/Telxon v. Lemelson*, CV-S-01-701[&702-703]-PMP(RJJ), torpedoing Lemelson's **machine vision and bar code patents** because of **prosecution laches** from “Lemelson’s 18 to 39 year delay in filing and prosecuting the asserted claims under the fourteen **patents-in-suit** after they were first purportedly disclosed in the 1954 and 1956 applications.” According to the “pro,” Judge Pro, “**prosecution laches** was first recognized in the **patent** context nearly 150 years ago in *Kendall v. Winsor*, 62 U.S. 322 (1858). ... Sixty-six years later, in *Woodbridge v. United States*, 263 U.S. 50 (1923), and *Webster Electric Co. v. Splittdorf Electrical Co.*, 264 U.S. 463 (1924), the **Supreme Court** applied the defense of **prosecution laches** to prevent the applicant from deliberately delaying the issuance of a **patent** solely to increase its commercial value, and to prevent the time when the public could enjoy the free use of an invention. In *Symbol Technologies, Inc. v. Lemelson Medical, Education and Research Foundation*, 277 F.3d 1361, 1363 (Fed. Cir. 2002), the **Federal Circuit** held in this case [2/1] that the doctrine of **prosecution laches** ‘...may be applied to bar enforcement of **patent** claims that issued after an unreasonable and unexplained delay in prosecution *even though the applicant complied with the pertinent statutes and rules*.’” Emphasis added. But here, **Congress** had already acted to sabotage *future* forays of the **Submarine Applications Fleet**, by in 1994 enacting legislation implementing the **General Agreement on Tariffs and Trade on Trade-Related Aspects of Intellectual Property Issues (GATT/TRIPS)**. There, **Congress** “*deGATTed*” and forestalled all “**TRIPS**” by new members of this **Fleet** and new missions by the old Submariners, for **GATT/ TRIPS** now “elegantly” limits the terms of patents applied for *after* its enactment to 20 years from the *earliest* claimed filing application date, irrespective of the date of the actual issuance of the **patent**. Thanks to **Congress** future Lemelson submariners have been “**e**liminated,” and if Judge Pro’s “proactive” pronouncement persists, pre-1995 Lemelson Submarines can now only “lemur-like” monkey aimlessly about, being “lemming-like” adrift “dead in the water.”

**LEAD COUNSEL: PRINCE OR FROG?** **U.S. District Court Judge Vaughn R. Walker** of the **Northern District of California** had, he knew, done a princely job. He had not relied on outward appearances and status to

appoint **lead class action counsel** in important **Securities Litigation** where defendant is accused of disseminating false and misleading statements concerning its future prospects. Instead, he had “initiate inquiries” to select counsel who presumably would live up to the princely obligation “to observe the ancient fundamental laws, and free customs of this land” (**Saxon Laws**, Kings Ina [712] – Hen. 3 [1100]), with dedication and economy, doing right by all class members and not just their personal client. But the **Ninth Circuit** acting as toady, he thought, to the **Private Securities Litigation Reform Act of 1995** and the fear of reversal (being, he had read, the most revered and reversed of the **Circuits**), had unfoundedly treated him, he felt, as a pollywog, holding that he must choose **lead counsel** based on such counsel’s clients’ “financial stake [due to losses suffered] in the litigation,” and accusing him of conducting “free-wheeling auctions,” when all he had done was to give weight to the fees potential **lead counsel** would charge (*In re Copper Mountain Securities Litigation*, 00-3894 (9th Cir, Sept. 18, 2002)). Though the **Ninth Circuit’s** unanimous three-judge panel had a different take: “Selecting a lawyer in whom a litigant has confidence is an important client prerogative and we will not lightly infer that **Congress** meant to take away this prerogative from securities plaintiffs. And, indeed, it did not.” But as Judge Walker intimates, the **Ninth Circuit’s** “kiss of approval” did not turn their **lead counsel** Milberg Weiss Bershad Hynes & Lerach, Esqs from a frog to a prince. “A class representative suing to rescue distressed plaintiffs may sometimes appear to be a prince. But, in reality, the heroic prince, perhaps, is actually a frog.” So writes Judge Walker in “kissing-off” Milberg and re-appointing his original choice, Beatie & Osborn, Esqs, as **lead counsel**, less than 16 months after Milberg had been “kissed” by the **Appellate Court**. He mused that: “Parties and their lawyers who win in the **Court of Appeals** and secure a remand are generally quite hot to trot once back in the trial court,” and he would have expected Milberg to proceed here “with vigor and passion. ... Alas, the hero appears to have vanished -- fled the scene -- gone south -- maybe vaporized.” Indeed, as Milberg had intimated to other counsel in the case, its lily-livered client has hopped away from its leading lily pad; and as the **Court** noted, Milberg, toad-like, has reneged on its princely obligations, including attending to the status conference and responding to **Court** communications. Judge “Cloudwalker” speculates that Milberg’s motives may have been “other than vindicating the interests of defrauded investors;” and that now maybe, with his original **lead counsel** back in place, as with many “fairy tales, Prince Charming vanquishes the villain, rescues the damsel in distress and all live ‘happily ever after’.” Frog’s legs, anyone?

**CROSS-BORDER ANTITRUST COOPERATION.** The **Canadian Competition Bureau 2003 Annual Report** stresses cross-border antitrust cooperation. It advises that the Canadians provide “technical assistance to a number of countries in the process of drafting their own **Competition Laws** or in various stages of implementing them,” including “advice on how to deal with specific investigations;” and that “International cooperation can be seen most prominently in the areas of merger review, international cartels and cross-border deceptive telemarketing and mail solicitation. Regarding the latter, Canadian and U.S. law enforcers ... increased efforts to cooperate in targeting cross-border deceptive telemarketing. The **Competition Bureau** and the **U.S. Federal Trade Commission** formalized their sharing of complaint and investigation data to catch cross-border fraud operators faster and more efficiently. ... In international cartel cases, the **Bureau** has cooperated with the **United States**, the United Kingdom, the European Union and Japan. Some noteworthy cases involved bulk vitamins and methylglucamine.... In merger reviews, the **Bureau** has been involved in many multi-jurisdictional merger transactions in which it has had to work closely with its foreign counterparts,” and **Bureau** personnel recently “held a seminar in Washington, D.C., for lawyers and economists at the **U.S. Federal Trade Commission** ... on the qualification and measurement of efficiencies arising from mergers.” Additionally, the **Bureau** is in discussions with the **World Trade Organization (WTO)** “exploring the interaction between trade and competition policies,” including “hard-core cartels as a serious breach of **Competition Law** ...”. It seems that here we are not alone.

\*\*\*

*You may contact columnist Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266 (412/566-2520; FAX 412/566-1088; E-Mail [bjlipson1@netzero.com](mailto:bjlipson1@netzero.com)). The views expressed are those of the persons they are attributed to and are not necessarily the views of the FBA, this publication or the author. Back issues are available on the United States District Court for the Western District of Pennsylvania website and bracketed [ ] numbers refer to Columns in the Index of Columns on that site: (<http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm>).*

Copyright© 2004 by Barry J. Lipson